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NO. 1297

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

EMERSON ELECTRIC CO., U. S. ELECTRICAL MOTORS, INC., BEN HARDWICK, TRAVIS CHEATHAM AND JERRY PALMER.....Petitioners

vs.

J. R. FULTON, HUBERT LOVERN, PAT GREEN, R. B. ROBERTSON, ALONZO DAVIS, LESTER LONG, ALTON COLE, OLYN COWARD AND CLIFTON McDONALD.....Respondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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The respondents, J. R. Fulton, Hubert Lovern, Pat Green, R. B. Robertson, Alonzo Davis, Lester Long, Alton Cole, Olyn Coward and Clifton McDonald respectfully oppose the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered on December 22, 1969.

Defendants: Carl J. Deweese, J. P. Stokes, Johnny L. McGraw, Irby Goldman and H. L. Breazeale, individually and as members of the Board of Supervisors

for Neshoba County, Mississippi; Lewis Clayton, Willis McKee, Paul Chunn, Johnny Whinery, and Harlan Majure, individually and as the mayor and aldermen of the town of Philadelphia, Mississippi; William D. Perry, individually and as Chief of Police in the town of Philadelphia; Stanley Dearman, editor of the Neshoba Democrat; Ray Stepp, James Smith, James Partridge, Dwight Gray, Ellis Fulton, Mike Barnett, Jerry Jenkins, Keith Copeland, Marzine Brantley, Jimmy Fox and Bernice Parker, did not petition this court for a Writ of Certiorari to review the judgment of the court below.

OPINION BELOW

The opinion of the Fifth Circuit is cited as 420 F 2d 527 (1969).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Fulton and McNeil, employees of Vickers, Inc., Jackson, Mississippi, were members of a local union at the Vickers Plant. Fred Prather was a representative of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE).[1] The other respondents were, at the time suit was filed, employees of Emerson. Prather sought the assistance of Fulton and McNeil in an attempt to organize the employees of Emerson. As the three non-employees of Emerson attempted to distribute handbills on a state highway adjacent to the plant, they were attacked by a mob, prevented from exercising their rights under the First

[1] McNeil, Prather and IUE did not join the appeal from the district court's dismissal of the complaint, and they are not respondents here.

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Amendment and statutory §7 rights, 29 USC §157. IUE, Prather, McNeil, Fulton and the other respondents filed suit in the district court in the Southern District of Mississippi, pursuant to the Civil Rights Acts — 42 USC §§1983, 1985, and 1986 — seeking equitable relief and damages against Emerson, various public officials of the town of Philadelphia and Neshoba County, and certain private citizens. The complaint charged that the defendants conspired to and did interfere with plaintiffs' rights of freedom of speech and assembly and statutory rights pursuant to 29 USC §157 to organize labor unions. The district court dismissed the action on the pleadings on the grounds: (1) That the complaint did not state a claim on which relief could be granted in that the complaint failed to allege the "state action" necessary under the Civil Rights Acts; and (2) that the claims were within the exclusive jurisdiction of the National Labor Relations Board (NLRB). The court of appeals reversed. The questions presented are:[2]

1. Whether concerted action of private parties and state officials, alleged in the complaint, is sufficient allegation of "state action" to state a claim upon which relief can be granted pursuant to 42 USC §§1983, 1985 and 1986?

2. Whether, and to what extent, the comprehensive scheme of federal regulation embodied in the National

[2] Plaintiffs contend in the complaint, that "state action" was also alleged in that the Emerson plant was financed under the Mississippi "Balance Agriculture with Industry Program" by the use of public funds, and administered by the State's "A & I Board". In footnote 5, the Circuit Court of Appeals ruled it was necessary to pass on whether such state financial participation and ownership of the plant was sufficient "state action" under the Civil Rights Acts to state a claim for which relief could be granted when other actions not directly connected with the financing were alleged. However, the court invited attention to *Burton v. Wilmington Parking Authority*, 1961, 363 US 715, 81 S Ct 856, 6 L Ed 2d 45.

Labor Relations Act (NLRA) as amended, has superseded the remedies provided by the Civil Rights Acts?

3. Whether the only forum available to respondents is the NLRB?

STATEMENT

The facts in the record are set forth in the complaint, and they are uncontradicted (R. 1-15).[3] The complaint is in three counts. In Count I, plaintiffs-respondents asserted a claim for damages and equitable relief to redress the deprivation under color of state law, regulation, custom and usage, or rights secured to them under the Fourteenth Amendment and 42 USC §1983 (R. 3). In Count II, plaintiffs-respondents asserted a claim to recover damages for injuries and for deprivation of rights due them as citizens which resulted from enumerated acts done by the defendants[4] in furtherance of a conspiracy with an unlawful purpose and carried out by illegal means in violation of 42 USC §1985 (R. 8). Plaintiff-respondents, in Count III, assert a claim for damages pursuant to 42 USC §1986 for the alleged failure of the defendants to prevent or aid in preventing the injury to plaintiffs' rights (R. 11).

The complaint alleges that on December 26, 1961, the town of Philadelphia, Mississippi, entered into a contract with U. S. Electrical Motors, Inc., (Emerson has now acquired the latter and operates the plant as a division thereof). The municipality made application to the Mississippi Agricultural and Industrial Board (A & I Board), an agency of the state, for a certificate of public convenience and necessity, pursuant to Chap-

[3] In the petition it is erroneously stated (p. 3): "This suit was filed by respondents, employees of petitioner. . ., and by a union . . ." As has been pointed out hereinbefore, Fulton, McNeil and Prather were never employees of Emerson.

[4] Some but not all of whom are petitioners here.

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ter 2, Title 23, Mississippi 1942 Code §§8936, et seq. The A & I Board approved the venture and on January 18, 1962, issued Certificate of Convenience and Necessity No. 371. The town electorate, on February 27, 1962, approved the bond issue, and the bonds were forthwith issued and sold. Following the sale, the mayor and board of alderman purchased approximately 112 acres of land for the plant site and awarded a construction contract. The plant was completed in August, 1963, and the company began operations. The town and the company entered into a lease contract for a term of 20 years (R. 3, 4). Two additional bond elections have been held to expand the plant. One additional issue was for $900,000.00, and the other was for $500,000.00. A total of $2,200,000.00 in public funds has been expended to build, equip and expand the plant. The County of Neshoba, wherein Philadelphia is county seat, was the political subdivision issuing the bonds for the plant expansion. (R. 4).

On February 1, 1967, Fulton and McNeil, members of IUE Local 792, at the Vickers Plant, with Prather, IUE Representative, passed out handbills to the employees of Emerson. They stood on the edge of a state highway contiguous to the plant. Travis Cheatham, general foreman of Emerson, instructed certain employees to start trouble with the union organizers in order to prevent the distribution of the literature favorable to the labor organization, and to chill the exercise by respondents of their First Amendment rights. (R. 6).

In the afternoon of March 1, 1967, Prather, McNeil and Fulton passed out another handbill and decided to distribute handbills that night as the second shift came off work. At about 8:30 P.M. on March 1, 1967,

a plan was made in the plant, under the direction of certain supervisory personnel, to have a mob attack Prather, McNeil and Fulton to prevent the respondents from communicating with Emerson employees and exercising First Amendment rights. (R. 7). Shortly before 12:00 o'clock midnight, a group of employees, pursuant to the plans previously made, left the plant before the shift ended, marched in a body, and physically assaulted Prather, McNeil and Fulton as they stood with union handbills at the intersection of State Highway 15 North and the driveway leading to the plant of Emerson, inflicting great physical damage on these union organizers. The mob effectively prevented respondents from exercising their First Amendment rights of free speech and assembly.

Certain of the respondents, on March 3, 1967, went to the office of William D. Perry, Chief of Police of Philadelphia, and reported the details of the attack, and also told him that they desired to continue the efforts on the public thoroughfares of the town of Philadelphia to organize the employees of Emerson, and to communicate with the said employees. Perry refused to investigate or prosecute the wrongdoers and refused to furnish protection to the respondents in their efforts to distribute literature and disseminate information concerning the union and the benefits to be gained by becoming a member. (R. 7).

The gravamen of the complaint was that the public officials, private businessmen, certain supervisors, employees and the company, in order to frustrate the efforts of the plaintiffs to exercise their First Amendment and federal statutory rights to communicate, assemble and peaceably organize a union, took concerted action and entered into a conspiracy against the plain-

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tiffs. It was charged that the union organizers were beaten when they attempted to distribute literature favorable to the labor organization; that the violence was a part of the concerted action and the unlawful means of carrying out the illegal purposes of the conspiracy; and that the public officials acquiesced in the physical assaults and discriminatory actions against plaintiffs. (R. 6-8).[5]

All defendants on August 30 and 31, 1967, filed motions to dismiss on the grounds: (1) The complaint failed to state a claim upon which relief could be granted; and (2) the district court lacked jurisdiction of the subject matter because the claims were within the sole and exclusive jurisdiction of the NLRB. (R. 16-47). The district court rendered an opinion on October 8, 1968, sustaining both grounds (R. 55-56); and, on October 11, entered an order dismissing the complaint (R. 57-58). On appeal the Circuit Court of Appeals reversed the district court and remanded the cause for a trial on the merits.[6]

REASONS FOR REFUSING THE WRIT

Respondents contend that this court should refuse to grant the writ of certiorari for the reasons set forth in the following paragraphs.

1. The decision of the Court of Appeals for the Fifth Circuit in this case in no way conflicts with the holdings of this court or with any other circuits. It is in full accord with all of the decisions in which the issues present herein have been considered. The Court of Appeals followed the pronouncements of the con-

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[5] 420 F. 2d, at pages 529, 530, fns. 3, 4.
[6] 420 F. 2d, at page 530.

trolling principles enunciated in *U.S. v. Price,*[7] *Linn v. Plant Guard Workers,*[8] and *Vaca v. Sipes.*[9]

2. Many more interests are involved in this case other than that of employee-employer relationships with which the NLRB was established to deal, since the dispute is between citizens and those who control the political institutions of a whole community. This case presents issues not limited to employee-employer relationships, but also issues of individual citizens and the state through participation of state officers in actions by private persons named as parties in the suit. The problems alleged in this complaint are of constitutional proportions, and they present matters with which the courts alone are equipped to cope. This case presents delicate and far reaching questions which demand full-bodied records for disposition.[10]

3. To reinstate the judgment of the district court and dismiss the complaint of the respondents as sought by petitioners would amount to a repeal of the Civil Rights Acts (42 USC §§1983, 1985 and 1986) by the NLRA (29 USC §151 et seq.), and would result in the denial of due process of law to respondents.

The Circuit Court of Appeals asserted that it was apparent that sufficient "state action" was alleged because the gravamen of the complaint was that public officials, private citizens and the company took concerted action to deprive the plaintiffs of even the opportunity to attempt to organize the employees of Emerson.

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[7] (1966), 383 US 787, 793.

[8] (1966), 383 US 53, 86 S.Ct. 657, 15 L.Ed. 2d 582.

[9] (1967), 386 US 171, 87 S.Ct. 903, 17 L.Ed. 2d 842.

[10] 420 F 2d at page 530, the Circuit Court of Appeals cites *Vaca v. Sipes,* supra; *International Union, United Automobile Workers (UAW-CIO) v. Russell,* 1957, 356 US 634, 78 S.Ct. 932, 2 L.Ed. 2d 1038; *Public Affairs Associates v. Rickover,* 1962, 369 US 111, 82 S.Ct. 580, 7 L.Ed. 2d 604.

ARGUMENT

POINT I.

ALLEGATION OF CONCERTED ACTION OF PRIVATE PARTIES AND STATE OFFICIALS IS SUFFICIENT "STATE ACTION" IN CIVIL RIGHTS SUITS

The district court held that the joinder of county and city officials with private party defendants in the complaint was insufficient to state a claim for relief under 42 USC §§1983, 1985 and 1986, and dismissed the civil action on the motion of defendants. The Circuit Court of Appeals reversed the district court and held:

> "[2] Concerted action of private parties and state officials has consistently been held to be sufficient allegation of 'state action' for 42 U.S.C.A. §1983 and §1985, *United States v. Price*, 1966, 383 U.S. 787, 793, 86 S.Ct. 1152, 1156, 16 L.Ed. 2d 267, 272; *Gomez v. Florida State Employment Service*, 5 Cir., 1969, 417 F. 2d 569, 578-579; *Baldwin v. Morgan*, 5 Cir., 1961, 287 F. 2d 750; *Boman v. Birmingham Transit Co.*, 5 Cir., 1960, 280 F. 2d 531." [11]

In *United States v. Price* [12] the rule is set forth in the following language:

> ". . .Private persons, jointly engaged with state officials in the prohibited actions, are acting 'under color' of law for the purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

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[11] 420 F. 2d, at page 530.

[12] 383 US, at page 794, 16 L.Ed. 2d, at page 272, 86 S.Ct., at page ———.

The statute referred to is 18 USC §242, but in footnote 7 [13] it is explained:

> "[5] 7. 'Under color' of law means the same thing of §242 that it does in the civil counterpart to §242, 42 USC §1983 (1964)..."

"Under color" of law in §1983 cases and "state action" under the Fourteenth Amendment amount to the same thing. [14] The complaint charged that the State of Mississippi, Neshoba County and the town of Philadelphia were joint venturers with Emerson in the operation of the manufacturing plant. The furnishing of public funds, acquiring land, constructing the plant and expanding the same was "state action" or "under color" of law since the political subdivisions had insinuated themselves into a position of interdependence with private persons. Since the conduct of the joint venturers violated the Fourteenth Amendment in regard to the plaintiffs, this also stated cause of action under §§1983, 1985(3) and 1986. [15] As was pointed out hereinbefore, the Circuit Court of Appeals deemed it unnecessary to pass on this charge.

Plaintiff-respondents correctly asserted jurisdiction under 28 USC §1343 in the complaint, and the Circuit Court of Appeals properly held that the pleadings, when given a *"Conley"* [16] reading, stated a claim upon which relief could be granted and jurisdiction under the Civil Rights Acts. Petitioners do not directly challenge this holding in their petition for a writ of certiorari.

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[13] *Ibid.*

[14] *Id.*, fn. 7.

[15] *Burton v. Wilmington Parking Authority*, 365 US 715, 6 L.Ed. 2d 45, 81 S.Ct. 856.

[16] *Conley v. Gibson*, (1957) 355 US 41, 78 S.Ct. 99, 2 L.Ed. 2d 80.

POINT II.

THE HOLDING OF THE CIRCUIT COURT OF APPEALS CONFLICTS IN NO WAY WITH THE DECISIONS OF THIS COURT PERTAINING TO PRE-EMPTION OF LABOR MATTERS

Petitioners erroneously assert that the controversy is solely between employees on one hand and Emerson and its top supervisory personnel on the other; that the case is a "labor dispute" as defined by 29 USC §159(2); that pursuant to §§7 and 8 of the NLRA [17] the exclusive jurisdiction to remedy respondents' complaints is vested in the NLRB; and that the decision of the Circuit Court of Appeals is in conflict with *San Diego Building Trades v. Gorman.* [18] The district court ruled that the claims in the complaint were pre-empted and in the exclusive jurisdiction of the NLRB and summarily dismissed the suit. (R. 56, 57). The Circuit Court of Appeals held that the district court was mistaken in applying the doctrine of pre-emption because there were many more interests than that of employee-employer relationships involved; that the dispute was also between citizens and those who control the political institutions of a whole community; that the suit was between individuals and the State through participation of State officers in actions by private persons; that the NLRB was not intended to deal with such problems and it could afford no relief as against any party but Emerson; that the problems alleged are of constitutional proportions where the courts have a constitutional role; and that the case presented delicate and far-reaching questions which demand full-bodied records for disposition. [19]

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[17] 29 USC §§157 and 158.

[18] (1959) 359 US 236, 245, 79 S.Ct. 773, 780, 3 L.Ed. 2d 775, 783.

[19] 420 F.2d, at page 530.

Petitioners mistakenly assert: "Respondents have acknowledged the Board's jurisdiction over this dispute by filing an unfair labor practice charge with the Board (R. 48-53)." The affidavit of Gaylord C. Burke (R. 49) states that the charge was "filed by one of the plaintiffs herein, namely, International Union of Electrical, Radio and Machine Workers, AFL-CIO. . .", and the charge (R. 50) shows that IUE is the charging party. IUE is not a respondent in these proceedings. Neither respondents nor counsel ever had any part in the proceedings before the Fifteenth Region of the NLRB. There has never been a hearing before the Board since the General Counsel refused to issue a complaint. There has been no adjudication by the Board of the facts alleged in the plaintiffs' complaint, nor could there be.

The integrity, efficacy, and uniformity of the national policy which the Congress has enacted to govern labor policy must be maintained; and the traditional responsibility of the federal government to insure its citizens their civil rights and to protect them in the exercise of constitutional rights is of paramount importance. By implication petitioners contend that both interests cannot be served, and that this court should ignore and sacrifice constitutional and civil rights of the respondents. The decision of the Court of Appeals, herein, preserves both interests without damage to either.

As reason number one for granting the writ of certiorari, petitioners dogmatically assert that the Court of Appeals has decided a federal question in a way which is in conflict with the decision of this Court in *San Diego Building Trades Council v. Garmon.*

The Court of Appeals gave due consideration to the *Garmon* case as stating the general rule of pre-emption

of labor matters by the NLRB and held that the district court was mistaken in applying the doctrine of pre-emption to this case. The Court of Appeals stated succinctly and with clarity the issues which distinguish this case from Garmon, as follows:[20]

> "The particular interests involved here may include those employee-employer relationships that the NLRB was established to deal with. But many more interests are involved. The dispute is not just between an employee and his employer. It is also between citizens and those who control the political institutions of a whole community. The relationship is not just employee-employer, but individual and the state through participation of state officers in actions by private persons. The NLRB was not intended to deal with such problems. Indeed it could afford no relief as against any party but the employer. The problems alleged here are of constitutional proportions — an area where the Courts always have a role."

The *Garmon* case was before this Court two times. On the first appeal[21] this Court held that the State Court had no power to enjoin the unions from peacefully picketing. The judgment appealed from was vacated and the cause remanded. The question reserved for consideration on remand was whether the NLRA precluded California from granting an award for damages arising out of the conduct in question. On remand the California court set aside the injunction but sustained the award of damages under state law. This Court again granted certiorari to determine whether the California court had jurisdiction to award damages

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[20] 420 F.2d, at page 530.

[21] (1957) 353 US 26, 1 L.Ed. 2d 618, 77 S.Ct. 607, 609, reh den 353 US 951, 1 L.Ed. 2d 860, 77 S.Ct. 858.

arising out of peaceful union activity which it could not enjoin, found that there was no compelling state interest involved, and reversed the judgment. The Court said:[22]

"* * * We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal and the other state, of inconsistent standards of substantive law and different remedial schemes.* * *

"* * * Thus judicial concern has necessarily focussed on the nature of the activities which the state has sought to regulate rather than the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has not required us to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act."

The *Garmon* case indicates that the activity which would be merely a peripheral concern of LMRA is "conduct marked by violence and imminent threats to public order."[23] This area is described in *Garner v. Teamsters C. & H. Union*[24] in the following language:

"This is not an instance of injurious conduct which the National Labor Relations Board is without ex-

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[22] 359 US, at pages 242, 243, 3 L.Ed. 2d, at pages 781, 782.
[23] 359 US, at page 247, 3 L.Ed. 2d, at page 784.
[24] (1953) 356 US 485, 488, 98 L.Ed. 228, 238, 74 S.Ct. 161.

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press power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers."

While the *Garmon* case and the *Garner* case are limited to concern with state powers, the same principle is applicable to the judicial exercise of federal powers, and this principle was correctly applied by the Court of Appeals to the issues in this case.

The *Garmon* case is so limited in its scope, as shown by the later decisions of the Supreme Court, that it does not conflict with the decision of the Court of Appeals in this case. The more recent cases of *Vaca v. Sipes*[25] and *Hanna Mining v. Marine Engineers,*[26] define the present state of the law and make it clear that the Court has in no way limited anything that the NLRB has the power to do, or may in fact do, with respect to any of the relief requested in the complaint. The private federal remedy available to respondents under 28 USC §1343 is unaffected by the possible or actual availability of an additional federal public remedy under the NLRA.

The case does not concern the pre-emption doctrine in its national supremacy aspects as was the situation in *Garmon* which involved a conflict between state and federal law. There it was held federal law excluded state law, but this case presents no issue of state law versus federal law. The district court, in effect, held, and petitioners contend, that the remedy under NLRA excludes the remedy under the Civil Rights Acts. From the decision in *Vaca v. Sipes,* cited supra, it can fairly be said that the presumption in respect to construing

[25] (1967) 386 US 171, 86 S.Ct. 903, 17 L.Ed. 2d 842.
[26] (1965) 382 US 181, 86 S.Ct. 327, 15 L.Ed. 254.

whether two federal remedies are to be deemed both fully available rather than one repealing the other, is just the opposite when the issue is whether federal law has displaced state law. Listed therein are many areas in which the Congress indicated it desired a multiplicity of remedies to be available and did not intend the one given in the NLRA to be exclusive. The right of an individual to sue in the courts to enforce an implied private federal law remedy for fair representation certainly should be applicable to the right of the respondents to sue in a federal court to enforce the express private federal right granted by Congress. In *Vaca v. Sipes* it was said:[27]

> "In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted 'where the activity regulated was a merely peripheral concern of the Labor-Management Relations Act. . . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional directions, we could not infer that Congress has deprived the States of the power to act.' *San Diego Building Trades Council v. Garmon,* 359 U. S. at 236. See, e.g., *Linn v. Plant Guard Workers,* 383 U. S. 53 (libel); *Automobile Workers v. Russell,* 356 U. S. 634 (violence); *International Assn. of Machinists v. Gonzales,* 356 U. S. 617 (wrongful expulsion from union membership); *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740 (mass picketing). See also *Hanna Mining Co. v. Marine Engineers Beneficial Assn.,* 382 U. S. 181. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and

[27] 386 US, at page 180.

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state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."

In *Vaca v. Sipes,* the plaintiff's rights asserted in his suit were all derived from the NLRA, and jurisdiction in the courts rested on no express grant by Congress but solely on implication. In the instant case the complaint sought to protect rights granted to the respondents by the First and Fourteenth Amendments.

The Congress by 28 USC §1343 has expressly conferred jurisdiction on the district court to grant damages, injunction and other legal and equitable relief when such deprivation of constitutional or statutory rights is alleged and proved. This court in *Hague v. C. I. O.,*[28] held that "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment."

The instant case is a much clearer one for the exercise of judicial power than *Vaca v. Sipes* because of the protection of constitutional rights which is the object of this suit, whereas all the rights protected in *Vaca v. Sipes* arose solely by reason of the provisions of the NLRA. If the courts have jurisdiction even where all the rights protected found their genesis solely in the NLRA, *a fortiorari* they have jurisdiction where the rights asserted arise under the Constitution of the United States and other federal legislation.

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[28] (1938) 307 US 496, 511, 83 L.Ed. 1423, 1435, 59 S.Ct. 954.

The NLRB has no history of decisions which affords any basis for assuming that the Congress intended the Board's remedy to be one which excluded relief under the civil rights legislation specifically designed for just such deprivations of constitutional and statutory federal rights as occurred in this case.

The rights which respondents asserted in the instant suit are not grounded in labor relations. The basis of the complaint was the abuse of state power which resulted in the beatings suffered by the three individual plaintiffs when they attempted to exercise their First Amendment rights to communicate with employees and the deprivation of all plaintiffs of their constitutional and statutory rights. The discretionary remedies of the NLRB directed solely to the public impact in the field of labor relations of the conduct of the employer defendant are in no wise impinged upon but are rather strengthened and enhanced by concurrent proceedings, such as this one, in the federal courts to give damages and injunctive relief aimed at redressing a deprivation by abuse of state power of constitutional and federal rights.

In *Linn v. Plant Guard Workers,*[29] in holding that there was nothing inconsistent about allowing the courts to continue their traditional jurisdiction over libel suits, even though a concurrent jurisdiction in the NLRB was available, this Court stated:[30]

> ". . ., it has been argued that permitting state action here would impinge upon national labor policy because the availability of a judicial remedy for malicious libel would cause employers and unions to spurn appropriate administrative sanctions for con-

[29] 383 US 53 (1966).
[30] 383 US at pp. 66-67.

temporaneous violations of the Act. We disagree. When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice. . . . Nor would the courts and the Board act at cross purposes since, as we have seen, their policies would not be inconsistent."

Similarly, in *International Assn. of Machinists v. Gonzales,*[31] the Supreme Court held that the courts and the NLRB could exercise concurrent jurisdiction over a wrongful expulsion from union membership. It was stated:[32]

". . . Although, if the union's conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. . . . And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United Automobile Workers v. Russell,* post, p. 634.

"If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coin-

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[31] 356 US 617 (1958).
[32] 356 US, at page 621.

cidence when the possibility of conflict with federal policy is similarly remote. . . ."

Again in *Automobile Workers v. Russell,*[33] this court held that a non-union employee could bring a common-law tort action in a state court to recover compensatory and punitive damages for losses he suffered by being barred from work by mass pickets. It was held:[34]

"In this case there is a possibility that both the Board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of 'conflict' of remedies referred to in *Laburnum.* Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have been concerned lest one forum would enjoin, as illegal, a conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts. . . .

". . . This does not mean that Congress necessarily intended this discretionary relief to constitute an exclusive pattern of money damages for private injuries. Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress."

These cases establish that the test laid down in *Garmon* is not applicable here. Rather this is a case in which the district court could proceed concurrently with NLRB proceedings, and the remedies of both may properly supplement each other. In any event the decision of the Circuit Court of Appeals is not in conflict with *Garmon* as contended, but it is in full accord with the holdings of this Court in the decisions rendered since *Garmon* on the issue of pre-emption.

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[33] 356 US 634 (1958).
[34] Ibid., at pp. 644, 645.

In 1959, the Congress enacted 29 USC §523. This statute amended §8 and other clauses of NLRA. Of significance is the statement:

> ". . . except as explicitly provided to the contrary, nothing shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any state."

Respondents contend that this evinces a congressional policy with respect to §8 proscriptions to the effect that unless it is explicitly provided to the contrary in the NLRA, the rights and remedies provided in 42 USC §§1983, 1985, and 1986 are not taken away from respondents.

CONCLUSION

For the reasons set forth hereinbefore the petition for a writ of certiorari should be denied, and all costs should be assessed against petitioners.

Respectfully submitted,

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